



STARRY

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Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143, GN Docket Nos. 13-5, WC Docket No. 05-25, RM-10593.**

Dear Ms. Dortch:

Starry, Inc. (Starry) writes to encourage the Commission to continue to ensure that all IP-based BDS providers offer just, reasonable, and non-discriminatory terms and conditions.

Starry is a Boston and New York City-based startup utilizing innovative millimeter-wave band technology developed from the ground up to re-imagine last-mile broadband access. Starry's full-stack technology consists of a network-node, a home receiver, and a Wi-Fi access point to provide high-speed, high-quality, wireless broadband to consumers.

Starry will provide a new competitive choice to broadband consumers in cities across the United States.<sup>1</sup> As the Commission has reported, almost half of all Americans only have access to one provider of fixed advanced telecommunications capability<sup>2</sup> – Starry intends to change that.

Fiber backhaul is a necessary component of Starry's service and all other wireless services, whether fixed or mobile. Without access to fiber, Starry and other companies reliant on fiber backhaul will find it difficult and nearly impossible to provide innovative and competitive new services to consumers.

It is imperative that the Commission recognize the risk that IP-based BDS providers pose to innovative companies when IP-based BDS providers also participate in downstream markets and are incentivized to discriminate against new entrants offering potentially competitive products. We respectfully ask the Commission to recognize this inherent risk and require all IP-based BDS providers to offer just, reasonable, and non-discriminatory terms and conditions.

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<sup>1</sup> Starry has received experimental authorization to test its technology in 18 markets. See OET Experimental License Grant, Call Sign WI2XEB, File Number 0073-EX-CM-2016 (granted Nov. 30, 2016). See also Starry, FCC Progress Report (Feb. 8, 2017), <https://apps.fcc.gov/els/GetAtt.html?id=187630&x=>.

<sup>2</sup> Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, 2016 *Broadband Progress Report*, 31 FCC Rcd 699, 736 Table 6 (2016).

### **Integrated IP-based BDS Providers Have Incentives to Engage in Discriminatory Behavior in Downstream Markets**

Many BDS providers participate in other markets, including retail broadband, mobile wireless, online advertising, video content production and delivery, data storage, and countless others. Because these markets rely on BDS as a critical input into the delivery of the product or service, it is rational for such an integrated BDS provider to exploit its position as the owner of the critical input. It is this anti-competitive incentive that the Commission can, with a light touch, minimize through this *Report and Order*.

While the Commission's data collection and competitive analysis<sup>3</sup> did not examine the downstream markets in which BDS providers participate, the BDS service offerings the Commission finds in the *Draft Report and Order* to be "private carriage" offer instructive examples.<sup>4</sup>

Both Charter and Comcast offer IP-based BDS services, which the Commission finds to be private carriage. Both Charter and Comcast participate in many downstream markets – they provide residential broadband service, have launched or plan to launch retail wireless services, are content owners and providers, and engage in interactive online advertising, among other services.

To the extent that competitive services or products in these markets rely on Charter or Comcast's IP-based BDS to provide their service, both would have a rational incentive to either not offer BDS to the competitive services or products, or do so on unreasonable, unjust, or discriminatory terms and conditions.

The Commission should recognize this as a real and existential threat to downstream competition that may not be corrected by market forces, and ensure that IP-based BDS providers cannot discriminate against downstream market competitors. Starry is supportive of an open and competitive marketplace free from unnecessary regulation, but also recognizes the important role a regulator can and should play in instances where there is limited competition and market forces are not enough to protect competition or serve consumers' best interests.

### **BDS Providers Negotiate on Terms and Conditions Even if they are Common Carriers**

The Commission's private carriage analysis relies on three factors: 1) individualized decisions by the BDS provider on whether to provide the service to any customer; 2) highly-individualized decisions by the BDS provider about the rates and terms when they do offer service to a customer; and 3) customers that are of a size and sophistication to demand a uniquely-tailored offering to meet their specific need.

In Starry's experience, IP-based BDS contracts are separately negotiated and the provider makes its decision to provide service based upon the specifics of the negotiation with the prospective customer. Starry is an early-stage company and at this phase, is not yet of a size to demand service or a uniquely

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<sup>3</sup> We also point out that a BDS provider that can discriminate against potential customers, including by declining to provide service, is not a competitive offering to BDS providers that must offer just, reasonable, and non-discriminatory rates, terms and conditions.

<sup>4</sup> Business Data Services in an Internet Protocol Environment et al., *Report and Order (Draft)*, WC Docket No. 16-143, GN Docket Nos. 13-5, WC Docket No. 05-25, RM-10593, at 100-113 paras. 256-273 (rel. March 30, 2017).

tailored offering from a BDS provider. As such, the BDS provider's decision to negotiate is specifically tied to its own business interests.

Notably, this was true even during the period in which the Commission's *Further Notice of Proposed Rulemaking* in this proceeding contemplated that BDS, regardless of whether it was IP-based, is a telecommunications service subject to the provisions of Section 201 and 202 of the Telecommunications Act.<sup>5</sup> This implies that BDS providers were negotiating the terms and conditions of BDS contracts even in a circumstance where there was substantial risk that they would be found to be a common carrier in the event of a challenge under Section 208.<sup>6</sup>

**The Commission Does Not Need Title II to Require All IP-based BDS Providers to Offer Service with Just, Reasonable, and Non-discriminatory Terms and Conditions**

Starry asks that the Commission recognize the potential for significant anti-competitive behavior by BDS operators in downstream markets, and take the minimal regulatory step to simply require that they offer just, reasonable, and non-discriminatory terms and conditions. This is a light touch action that the Commission can take to ensure that downstream markets that rely on BDS remain competitive, even in the face of a market participant that owns and controls this critical input.

The Commission does not need to regulate IP-based BDS under Title II to set these requirements. Instead, the Commission can simply require any Title I BDS provider to offer service on just, reasonable, and non-discriminatory terms and conditions. The Commission has the authority to take this action under Title I and Section 706, precisely because of the substantial risk that private carriage BDS providers might exercise anti-competitive power in the downstream retail broadband market.<sup>7</sup>

Starry believes the public interest will be served by imposing this minimal requirement on IP-based BDS providers whose service may qualify as a Title I service. BDS providers will still have substantial flexibility to engage in private contractual negotiations with prospective customers. Prospective customers merely gain a right to *ex post* adjudication of whether terms or conditions were just, reasonable, or non-discriminatory. And, the rates will continue to be subject exclusively to market forces.

With this limited regulatory guard rail in place, the Commission can help ensure robust and competitive downstream markets, including for the provision of fixed and mobile wireless broadband.<sup>8</sup>

Respectfully Submitted,

Virginia Lam Abrams  
Starry, Inc.

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<sup>5</sup> Business Data Services in an Internet Protocol Environment et al., *Tariff Investigation Order and Further Notice of Proposed Rulemaking*, 31 FCC Rcd 4723, 4836-37, para. 257 (2016).

<sup>6</sup> 47 U.S.C. § 208.

<sup>7</sup> See 47 U.S.C. §§ 151, 1302(a).

<sup>8</sup> It will also help ensure that BDS subject to Title I is an actual substitute to BDS subject to Title II.

Cc:

Chairman Ajit Pai

Commissioner Mignon Clyburn

Commissioner Mike O’Rielly

Nick Degani

Jay Schwarz

David Grossman

Erin McGrath

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